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No. 90-570

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

KENNETH L. McGINNIS,

Petitioner,

v.

JAMES ROSE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari where the State of Illinois failed to seek review of *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990), and *Rogers-Bey* v. *Lane*, 896 F.2d 279 (7th Cir.), *cert. denied*, 59 U.S.L.W. 3245 (1990), cases which the Seventh Circuit deemed dispositive of the issues before it in *Rose*, and where the opinions in *Falconer*, *Rogers-Bey* and *Rose* do not conflict with decisions of this Court, other circuit courts or state courts of last resort.

2. Whether, given the significant evidence that Rose believed he was acting in self-defense, Rose's murder and armed violence convictions violated due process because the instructions did not require the jury to determine whether Rose possessed that belief.

3. Whether, under *Harris* v. *Reed*, 109 S. Ct. 1038 (1989), a federal court may grant Rose habeas corpus relief when the Illinois Appellate Court did not provide a "clear and express statement" that its decision affirming Rose's conviction rested on his failure to object at trial.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS IN THE CASE

The Seventh Circuit's opinion is reported at 910 F.2d 400, and the slip opinion is reproduced in Appendix A of the Petition. The opinions of the district court and the Illinois Appellate Court are unreported and are reproduced in Appendices B and C of the Petition, respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case puts in issue the fourteenth amendment's due process clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. This case also puts in issue 28 U.S.C. § 2254(a) (1988): "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

STATEMENT OF THE CASE

In October 1983, Respondent James Rose was tried for murder, armed violence and voluntary manslaughter in the Circuit Court of St. Clair County, Illinois. Relying on the Illinois pattern jury instructions, the trial court instructed the jury that it had to convict Rose of murder if it found that he intentionally fired the shot without lawful justification. Respondent's Appendix, at App. 1-2. The court further instructed the jury that "[a] person is justified in the use of force when and to the extent that he *reasonably* believes that such conduct is necessary to defend himself against the imminent use of unlawful force." *Id.*, at App. 4 (emphasis added). The court failed, however, to instruct the jury that it had to acquit Rose of murder if it found that he believed, however *unreasonably*, that he was acting in self-defense. In addition, the trial court instructed the jury that it could not convict Rose of voluntary manslaughter unless the State

proved, beyond a reasonable doubt, that Rose believed that his actions were justified. *Id.*, at App. 2-3. The Illinois Supreme Court subsequently invalidated these pattern instructions, holding that the State had the burden of proving that a defendant lacked any belief that his actions were justified. *See People* v. *Reddick*, 123 Ill. 2d 184, 195-97, 526 N.E.2d 141, 145-46 (1988).

Rose did not object to the jury instructions on grounds relevant to this habeas corpus action. The jury convicted Rose of murder and armed violence, and acquitted him of voluntary manslaughter.[1] The court sentenced him to forty years in prison.

On appeal to the Illinois Appellate Court, Rose argued that the jury instructions violated the fourteenth amendment's due process clause. After performing a plain error analysis, the court rejected Rose's argument. *People* v. *Rose*, No. 5-84-0078 (Ill. App. Jul. 11, 1985) (Petitioner's Appendix C, at App. 23-24). Rose presented his jury instruction argument again to the Illinois Supreme Court. Petition for Leave to Appeal, People v. Rose (Petitioner's Appendix D, at App. 29-35). That court denied review.

In March 1986, Rose petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Illinois, where he again argued that the jury instructions violated due process. Memorandum in Support of Habeas Petition, Rose v. Lane, No. 86-3088 (S.D. Ill. Aug. 18, 1987) (Petitioner's Appendix E, at App. 53-57). The district court denied Rose's petition on the grounds that

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[1] An individual commits armed violence in Illinois by committing murder with a dangerous weapon. Rose never contested at trial that a dangerous weapon caused the death, so the finding of murder virtually assured the finding of armed violence. Ill. Rev. Stat. ch. 38, para. 33A-2 (1983).

he had procedurally defaulted. *People* v. *Rose*, No. 86-3088 (S.D. Ill. Aug. 18, 1987) (Petitioner's Appendix B, at App. 12-14). Rose appealed to the United States Court of Appeals for the Seventh Circuit. In November 1989, the Seventh Circuit discharged Rose's attorney in the appeal and appointed Rose's current counsel. In its order, the court instructed newly appointed counsel to address whether *Reddick* applied to this case and whether "the failure to instruct a jury on an element of a crime proscribed by state law constitutes a federal constitutional violation." *Rose* v. *Lane*, Order (7th Cir. Nov. 27, 1989) (Petitioner's Appendix F, at App. 61).

On August 6, 1990, the Seventh Circuit reversed, holding that, as a result of the fundamental unfairness caused by the flawed jury instructions, Rose's conviction violated the due process clause, and that procedural default did not bar review because the Illinois Appellate Court had not clearly and expressly based its decision on procedural default. *Rose* v. *Lane*, 910 F.2d 400, 402-03 (7th Cir. 1990). The State now seeks a writ of certiorari in this Court.

ARGUMENT

I. *Rose* v. *Lane* Is Inappropriate for Certiorari Because the Petition Presents Insufficient Grounds for Review and Because the State Did Not Seek Certiorari in Cases That Controlled the Outcome in *Rose*.

The State's petition presents insufficient reasons for certiorari. The State presents only one ground for certiorari, namely that *Rose* v. *Lane*, 910 F.2d 400 (7th Cir. 1990) violated Supreme Court precedent concerning the due process clause and the habeas corpus procedural bar doctrine. *Rose*, however, does not conflict with any decisions of this Court. *See infra* §§ II & III, at 5-13. The State cites no other "special or important reason" for granting certiorari on either issue, such as a conflict among the circuits or conflicts

involving state courts of last resort. *See* SUP. CT. R. 10.1 (considerations governing review of writ of certiorari). In addition, the relative insignificance of *Rose* as compared to the other cases this Court will review this term should encourage the Court to deny the Petition.

Moreover, the *Rose* court's reliance on controlling authority makes it inappropriate for review. The Seventh Circuit straightforwardly applied the reasoning and holdings in *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990) and *Rogers-Bey* v. *Lane*, 896 F.2d 279 (7th Cir.), *cert. denied*, 59 U.S.L.W. 3245 (1990), as controlling authority on the two issues presented for review. *See Rose*, 910 F.2d at 402-03 (relying on *Falconer* for the merits and on *Rogers-Bey* for procedural default). The *Falconer* holding left the *Rose* court little to discuss, allowing it to resolve the due process issue in only six sentences and a footnote. *Rose*, 910 F.2d at 401-02. Thus, the outcome of *Rose* was dictated by stare decisis rather than by analyses of due process or procedural default. The State did not file a petition for certiorari in these cases, but it now asks this Court effectively to overrule them through the vehicle of this case.

II. Rose's Conviction Violated Due Process Because the Instructions Allowed the Jury to Convict Him of Murder Without Having Determined Whether He Had a Belief, However Unreasonable, That He Was Acting in Self-defense.

The jury found Rose guilty of murder without correct instructions on the significance of the evidence that, at the time of the killing, he had believed he was acting in self-defense. Rose's testimony, along with other evidence, indicated that he had believed he was acting in self-defense. For example, Rose testified as follows:

> Q When you saw him pull that weapon, did you believe he was going to use it?

A Yes, sir. He did it in a sneaky type way, and by me sitting there, I saw him go up under his coat this, and the only thing I thought was that he grabbed a shotgun.

Q Did you believe he was going to pull that gun on you?

A Yes, sir.

Q Did you believe he was going to use it on you?

A Yes. I was very scared, so that is why I reacted the way I did.

Q Did you believe at the time you fired that first shot from the shotgun, you were defending yourself?

A Yes, sir.

T. 366-67. The State, of course, had no incentive to, and in fact did present no evidence that Rose had believed he was defending himself.

Contrary to the instructions that the court gave at Rose's trial, Illinois law at that time required that, if the defendant presented evidence that he had believed he was acting in self-defense at the time of the killing, then the trial court had to instruct the jury to acquit the defendant of murder unless the State proved beyond a reasonable doubt that he lacked that belief. *People* v. *Reddick*, 123 Ill. 2d 184, 195-97, 526 N.E.2d 141, 145-46 (1988). The instructions that the trial court gave instead permitted the jury to find Rose guilty of murder without considering whether he possessed this mitigating mental state. Furthermore, even if the jury in fact had considered the evidence, the wording of the instructions makes it impossible to determine whether the jury found that the State had disproved beyond a reasonable doubt that Rose had possessed the mitigating mental state.

See Reddick 123 Ill. 2d at 195-97, 526 N.E.2d at 145-46. As the Seventh Circuit explained,

> The hardship for the petitioner in this case is that even though the judge properly decided that the jury should consider a verdict of voluntary manslaughter, the jury may have been left with the false impression that it could convict the petitioner of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction.

Falconer, 905 F.2d at 1136; *Rose*, 910 F.2d at 401-02 (incorporating the reasoning of *Falconer*). This error was far from a mere technicality. "Explicit misdirection on this scale violates the constitutional guarantee of due process and demands a new trial . . . ." *Falconer*, 905 F.2d at 1137.

Accordingly, the Seventh Circuit properly held that the *Reddick* error at Rose's trial violated the fourteenth amendment because " 'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' " *Falconer*, 905 F.2d at 1135 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)); *Rose*, 910 F.2d at 403 (relying on *Falconer*). *Rose*, therefore, presents no new rule of constitutional law; the Seventh Circuit merely invoked the long-standing function of the due process clause to "safeguard[ ] the liberty of the citizen against deprivation through the action of the state." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam) (citing *Herbert* v. *Louisiana*, 272 U.S. 312, 316-17 (1926)).

The State argues, however, that the Seventh Circuit's decisions in *Rose* and *Falconer* violated *Engle* v. *Isaac*, 456 U.S. 107 (1982). This argument rests on a misreading of *Engle*. In *Engle*, the Court held that a state's decision to assume the burden of disproving an affirmative defense does not necessarily mean that due process requires it to do so. 456 U.S. at 120. The Court never held, as the State here argues, that only jury instructions on elements of crimes can

violate due process.[2] Unlike the error in *Engle*, allocations of burdens of proof are simply not the issue when addressing a *Reddick* error. "The State misinterprets the petitioner's argument when it cites United States Supreme Court precedent for the proposition that, as a matter of constitutional law, the burden of proof as to an affirmative defense may be placed on either the defendant or the state." *Falconer*, 905 F.2d at 1136.

Unlike a simple burden of proof error, a *Reddick* error allows a jury to find a defendant guilty of murder without determining whether he believed he was acting in self-defense. The *Falconer* court correctly observed that a *Reddick* error does not implicate *Engle*, because "[n]o matter which side carried the burden of proof on any particular element or defense, there can be no question that a murder verdict would have been improper if the jury had found one of the mitigating mental states." *Id. Falconer's* holding that a *Reddick* error deprives a defendant of due process therefore does not violate this Court's precedent, because the *Falconer* court only held that the net effect of the instructions was to render the trial fundamentally unfair.[3]

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[2] The State's argument contains certain incorrect factual premises. The State's first question presented states that the Illinois Supreme Court invalidated the pattern instructions because they "misassigned the burden of proof of an affirmative defense." In actuality, the Illinois Supreme Court studiously avoided terming the "mitigating mental state" an "affirmative defense." *Reddick*, 123 Ill. 2d at 194-198, 526 N.E.2d at 145-46. Second, the problem with the instructions was not that they misassigned the burden of proof, but rather that they did not require the jury to consider the evidence of that mental state to find Rose guilty of murder.

[3] This analysis highlights a misstatement in the State's petition. Neither the *Rose* nor the *Falconer* court relied on "a theory never

Furthermore, the State's inflammatory suggestion that this Court must review *Rose* to avoid "the release of every murderer in Illinois convicted between 1961 and 1987 who had a voluntary manslaughter instruction given at his or her trial" is incorrect. First, a *Reddick* error does not allow the "release" of "murderers." It only provides an argument that could support a habeas corpus petition to those convicted of murder and acquitted of voluntary manslaughter. A petition, in turn, may lead to a new trial only if the district court resolves various significant issues in the petitioner's favor. Significantly, habeas corpus petitioners must overcome the harmless error doctrine, which will bar relief in many cases. *See, e.g., People* v. *Harris,* 132 Ill. 2d 366, 395, 547 N.E.2d 1241, 1254 (1989), *cert. denied,* 110 S. Ct. 2594 (1990) (jury instruction error analogous to *Reddick* error would be harmless beyond a reasonable doubt); *People* v. *Moleterno,* 199 Ill. App. 3d 15, 23-24, 556 N.E.2d 703, 708-09 (1990) (finding *Reddick* error harmless beyond a reasonable doubt).

III. The Seventh Circuit Properly Addressed Rose's Due Process Claim Because the Illinois Appellate Court Did Not Clearly and Expressly State That Its Decision Rested on Procedural Default.

In *People* v. *Rose,* No. 5-84-0078 (Ill. App. Jul. 11, 1985) (Petition, Appendix C), the Illinois Appellate Court held, after addressing some of Rose's jury instruction arguments other than his due process argument, that no plain error had occurred at Rose's trial. *Id.,* Petitioner's Appendix C, at

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discussed by the State Supreme Court." Petition, at 7-8. To the contrary, the Seventh Circuit specifically relied on the Illinois Supreme Court's reasoning as to why the instructions were unfair, and found them so fundamentally unfair as to violate due process. *Rose,* 910 F.2d at 401-02.

App. 23-24.[4] The court nowhere stated in clear and express language, however, that procedural default constituted an alternative ground for its decision. In federal habeas corpus proceedings, no procedural bar exists unless a state court makes such a plain statement as to the basis of its holding. *Harris* v. *Reed*, 109 S. Ct. 1038, 1042 (1989). Accordingly, Rose's failure to object at trial does not bar collateral review.

The State admits in its petition that the Illinois Appellate Court considered "whether the plain error exception applied, and concluded that it did not." Petition, at 9. The State argues nonetheless that this finding of no plain error is somehow a clear and express statement that Rose's failure to object at trial procedurally barred its consideration of the issue. *Id.* This argument, however, simply ignores the straightforward holding of *Harris*. The Court in *Harris* gave an example of a sufficiently clear and express statement upon which a federal court could rely to find a procedural bar: "a state court that wishes to rely on a procedural bar rule . . . easily can write that 'relief is denied for reasons of procedural default.' " *Harris*, 109 S. Ct. at 1044 n.12. Not only did the court make no such statement in Rose's case, but it went on to hold, under the substantive law of Illinois and therefore under the due process clause, that no plain error had occurred. *People* v. *Rose*, Petitioner's Appendix C, at App. 23-24.[5]

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[4] Noting the Illinois Supreme Court's holding that using these instructions constituted grave, reversible error, the Seventh Circuit questioned the validity of this holding. *See Rose*, 910 F.2d at 402 (discussing *Reddick*, 123 Ill. 2d at 198, 526 N.E.2d at 147).

[5] It is of course true the Illinois Appellate Court did not analyze the fourteenth amendment cases cited by *Rose*. Procedural default does not bar review, however, merely because a state appellate court consciously decides to ignore the federal constitu-

The State essentially asks this Court retreat from its holding in *Harris*, proposing that a state court's holding on the absence of a substantive law exception to a state procedural waiver rule suffices under *Harris* as explicit reliance on procedural grounds for the decision. Petition, at 9-10. Such a rule, however, would irreconcilably conflict with the sound policy determinations of *Harris*. First, any exception to the clear and express plain statement rule would swallow the rule; either a statement is "plain," or it is not. "[T]he impact of *Harris* is clear—the state court must not only rely in [sic] the procedural default, it must actually state that it is doing so . . . ." *Rogers-Bey*, 896 F.2d at 282. Even if the absence of plain error constituted a procedural bar before *Harris*, *Harris* removes that possibility unless the state court expressly states that the defendant waived the claim by not objecting at trial.

Second, if *Harris's* plain statement rule can be satisfied merely by a state court's holding that substantive law does not excuse procedural default, then federal courts would have to determine whether the substantive law at issue in fact constituted an excuse under state law to procedural waiver. That task often presents difficult legal issues wholly inappropriate for review by a federal court in collateral proceedings. To begin with, the state court's opinion itself may be unclear. "The question whether a state court's reference to state law constitutes an adequate and independent state ground for its judgment may be rendered difficult by ambiguity in the state court's opinion." *Harris*, 109 S. Ct. at 1042.

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tional arguments contained in the briefs. *Cf. Smith* v. *Digmon*, 434 U.S. 332, 333-34 (1978) (prisoner does not fail to exhaust state remedies merely because the state court fails to address an issued presented to it).

Moreover, federal courts should not have to decipher state law. Federal habeas courts should not "be required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Harris*, 109 S. Ct. at 1044. The decisions in *Phillips* v. *Lane*, 787 F.2d 208 (7th Cir.), *cert. denied*, 479 U.S. 873 (1986) and *Rogers-Bey* illustrate why federal courts should not engage in unnecessary analyses of state substantive plain error law. In *Phillips*, the Seventh Circuit analyzed at length the "underlying, inferred intent of the [state] court" to determine whether procedural default barred habeas corpus review. *Rogers-Bey*, 896 F.2d at 281-282 (discussing *Phillips*). The court held that plain error analysis was discretionary under Illinois law. *Phillips*, 787 F.2d at 211-15. In contrast, the court in *Rogers-Bey* stated that Illinois law *requires* a court to consider plain error following a holding that a claim had been waived. *Rogers-Bey*, 896 F.2d at 280. A strict adherence to the rule in *Harris* will enable federal courts in the future to avoid time-consuming, inconclusive explications of state law such as these.

Finally, the state grossly exaggerates the effect of *Rose* by arguing that the decision "will allow federal courts to disregard procedural bars in State courts." Petition, at 9. To the contrary, *Rose* does nothing more that enforce *Harris's* requirement that state courts must plainly state whether they are relying on a state procedural waiver rule to effect a procedural default. If a state court makes such a plain statement, no federal court could "disregard" that procedural bar. Furthermore, the State reveals an extraordinary distrust of state courts by arguing that "no state courts would make a plain statement" as required by *Harris* if they found no plain error. Petition, at 9-10. This Court has

required such a plain statement to effect a procedural bar, and state courts will no doubt follow this Court's directive.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

INSTRUCTIONS,

BY THE COURT:

Members of the jury, the evidence and arguments in this case have been completed. I will now instruct you as to the law. The law that applies in this case is stated in these instructions, and it is your duty to follow all of them.

You must not single out certain instructions and disregard others. It is your duty to determine the facts, and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case. Neither sympathy nor prejudice should influence you.

* * * *

The defendant is charged with the offenses of Murder and Armed Violence. The defendant has pled not guilty.

A person commits the offense of Murder when he kills an individual without lawful justification, if, in performing the acts which causes death, he intends to kill or do great bodily harm to that individual or another, or he knows that such acts will cause death to that individual or another, or he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

To sustain the charge of Murder, the State must prove the following propositions. First, that the defendant performed the act which caused the death of Thomas Maze. Second, that when the defendant did so he intended to kill or do great bodily harm to Thomas Maze, or he knew that such act would cause death or great bodily harm to Thomas Maze, or he knew that his acts created a strong probability of the death or great bodily harm to Thomas Maze.

And third, that the defendant was not justified in using the force which he used.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

A person commits the crime of Voluntary Manslaughter when he kills an individual, if in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual or another;

Or he knows that such acts will cause death to that individual or another, or he knows that such acts create a strong probability of death or great bodily harm to that individual or another;

And at the time of the killing he believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable.

To sustain the charge of Voluntary Manslaughter, the State must prove the following propositions: First, that the defendant performed the acts which caused the death of Thomas Maze.

Second, that when the defendant did so, he intended to kill or do great bodily harm to Thomas Maze, or he knew that his acts would cause death or great bodily harm to Thomas Maze, or he knew that his acts created a strong probability of death or great bodily harm to Thomas Maze.

Third, that when the defendant did so, he believed that circumstances existed which would have justified killing Thomas Maze.

Fourth, that the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

When I either use the phrase reasonable belief or reasonably believes, I mean that the person concerned, acting as a reasonable man, believes that the described facts exist.

A person commits the crime of Voluntary Manslaughter who kills an individual, if at the time of the killing, he acts under a sudden and intense passion resulting from serious provocation by the deceased.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

To sustain the charge of Voluntary Manslaughter, the State must prove the following propositions. First, that the defendant performed the acts which caused the death of Thomas Maze.

Second, that when the defendant did so, he acted under a sudden and intense passion resulting from serious provocation by Thomas Maze.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

A person commits Armed Violence when he commits the offense of Murder while armed with a dangerous weapon. A person is considered armed with a dangerous weapon when he carries on or about his person or is otherwise armed with a shotgun.

To sustain the charge of Armed Violence, the State must prove the following propositions. First, that the defendant committed the offense of Murder. Second, that when he committed the offense of Murder, he was armed with a dangerous weapon. Third, that the defendant was not justified in using the force which he used.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force. However, a person is justified in the use of force which is intended or likely to cause death or great

bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another.

The defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during the deliberations on the verdict, and is not overcome unless from all the evidence in this case, you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.